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No. 09-1399

SUPREME COURT, U.S.
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In the
Supreme Court of the United States

PAUL SIMS,

Petitioner,

v.

SUSAN K. SCHLOTT, et al. and IMOGENE KELLY, et al.,

Respondents.

On Petition for Writ of Certiorari to the District Court of Appeal First District, State of Florida

PETITIONER'S REPLY BRIEF

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REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Respondents' Statement of the Case argues several points incorrectly:

1. While Respondents correctly list the stated reasons in Trial Judge Swanson's May 2004 Order as to why Judge Swanson removed Petitioner Sims as Trustee and issued the murky "injunction" against Sims, Respondents purposefully fail to include the undisputed fact that, by November 2005, all the accusations against Sims turned out to be incorrect. That is, the business investments Respondents complained of in May 2004 made money for the Trusts. Or, as Respondents prosaically admit in their Statement of the Case, "Although the successor trustees recouped several million dollars [ ]". Thus, holding Sims in contempt in May 2007, was, at best, not "crystal clear."

2. Respondents state at page 3 of their Brief that "the record show that petitioner personally pocketed over six million dollars in profits by self-dealing with trust assets [ ]". This is, at best, a misstatement. The record shows that Respondents filed a summary judgment motion which was granted by Trial Judge Linda Nobles after she ruled that Petitioner could present no evidence on either the issue of damages or the issue of "self-dealing" or evidence on legal defenses to self-dealing. Thus, the record reveals that Sims was held liable after the trial court forced Sims into default. There is no factual record.

Finally, Petition also clarifies for the Court that the "successor trustees" to whom Respondents refer were, in fact, Respondents (the beneficiaries of the Trusts) own attorneys. This troubling fact, i.e., where the beneficiaries of a trust also direct the trust there is no trust, will factor importantly into the appellate arguments should the Court decide to grant the petition.

ARGUMENT

I. The Okaloosa County Circuit Court's Judgments, and Florida's First District Court of Appeal failure to explain its affirmation of those confusing and contradictory orders, raise important federal questions.

Respondents cite *Michigan v. Long*, 463 U.S. 1032 (1983) to support their argument that Petitioner presents no federal question. However, this Court, in *Michigan* said: "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Id.* at 1041.

Thus, this Court respects state appellate courts when those courts fulfill their duties to tell citizens what the law is. However, this Court also pointed out in *Michigan* that "it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." *Id.*, quoting *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940).

A case more applicable to Petitioner's case is *Bunkley v. Florida*, 538 U.S. 835, 841-842 (2003) where this Court reviewed a Florida Supreme Court decision that never asked whether the Florida weapons statute had "evolved" by 1989 to such an extent that Bunkley's 2 ½ - to 3 inch pocketknife fit within the "common pocketknife" exception. This Court remanded the case to the Florida Supreme Court with instructions that it should consider whether Bunkley's pocketknife of 2 ½ to 3 inches fit within §790.001(13)'s "common pocketknife" exception at the time his conviction became final. *Id.* at 841-842.

Here, Petitioner asks the Court to consider whether the United States Constitutions Bill of Rights allows Florida trial courts to incarcerate people for civil contempt without determining whether or not the individual has the ability to purge himself of the contempt.

Equally important, Petition believes that the United States Constitution's Bill of Rights requires state and federal courts to tell citizens what the law is and to resist deciding what the rules are after the fact.

For example, when Judge Bell struck Petitioner's pleadings on December 3, 2007, Judge Bell stated that "No further pleadings or evidence shall be allowed by or on behalf of the Defendant as to matters that were the subject of the Plaintiff's Motion to Compel and this Court's Order Compelling Discovery date October 9, 2007." Petitioner's Appendix D at 19a. Those matters were the claimed six million dollars of alleged profits. Yet, when Petitioner attempted to present evidence showing that he did not self-deal or, in the alternative,

that he was not personally liable for self-dealing (because of the legal defenses cited in the Petition), Judge Nobles unlawfully expanded Judge Bell's ruling to prohibit any evidence whatsoever of any type on any issue. *See*, Petitioner's Appendix C.

As in *Bunkley*, Petitioner argues that Florida courts are constitutionally compelled to consider whether or not Florida trial judges can decide what the "law of the case" is as it suits them to avoid dealing with time-consuming and complex cases.

In *Barney v. Saunders*, 57 U.S. 535, 539 (1853) this Court recognized that if trustees acted in good faith, exercised a sound discretion, used ordinary care and diligence, acted under the advice of counsel, and were actuated by a sincere desire to promote the interest of the trust estate, trustees are not to be charged with the losses. That is, trustees are only personally liable in cases of clear negligence, perversion of the trust, or willful default. Here, Trial Judge Swanson removed Sims in May 2004 because he found Sims to have wrongfully risked Trust assets in speculative investments. Later, those investments turned out not to be speculative and the Trust incurred no loss. Yet, the trial judges acted as if nothing had changed.

Florida law is the same as set out in *Barney*. In *Griffin v. Griffin*, 463 So.2d 569, 574-575 (Fla. 1st DCA 1985) the trust vested "absolute discretion" in the trustee. The court found that payments made by the trustee were erroneous, but Florida's First DCA also held that the trustee's actions did not rise to the level of **"willful negligence or gross unfaithfulness to [the] trust,"** that would require the trustees to

account to the beneficiaries personally for sums expended. (emphasis added).

Here, by November 2005 Respondents had admitted that the Trust had reaped substantial income from Sims' alleged risky investments. Yet, all the trial judges and the First DCA ignored Sims' pleas to let him prove that he acted in good faith, under the advice of counsel, according to what Mattie Kelly wanted, and that he was not willfully negligent or grossly unfaithful.

If this Court should grant certiorari, Petitioner will ask the Court to overturn the judgments ordering his incarceration and confiscating all property. Petitioner will also contend that all of the judgments after his wrongful incarceration must be set aside because the wrongful incarceration tainted the remainder of the proceedings in the lawsuit. From Petitioner's wrongful incarceration to the present, the Florida courts have violated Petitioner's right to due process of law.

In most, if not all, jurisdictions, a trustee is not prohibited from personal gain in a transactions if there was: a) no self-dealing; b) the self-dealing was authorized by the Settlor; c) the self-dealing was by a non-professional trustee who entered into the transactions in good faith and where the beneficiaries were not harmed; or d) where the beneficiaries consented. See, e.g., *Heyman v. Heyman*, 33 N.Y.S.2d 235, 241-244 (N.Y. Sup. Ct. 1942) for the long-established rule of law that authority for a trustee to deal with his own firm and earn a normal profit is not necessarily inconsistent with the existence of a trust relationship; §736.0806 Fla. Stat. which allows a trustee who has special skills or expertise to use those

special skills or expertise; and §736.1011 Fla. Stat. which allows a trustee to prove that an exculpatory clause, such as the one that Mattie Kelly executed when she set up her trusts, is fair under the circumstances.

Again, Paul Sims had no opportunity to prove what Mattie Kelly wanted and, yes, Paul Sims blatantly asserts that Mattie Kelly appointed Paul Sims and only Paul Sims to execute the business of the Trusts.

II. Trial Judge Bell did not care that Sims did not have the ability to purge himself of the civil contempt.

At page nine of Respondents' Brief, Respondents state casually: "Apparently unwilling to satisfy the purge amount, petitioner was incarcerated on May 30, 2007." In fact, as cited in the Petition, the record shows that Sims did everything he could do to avoid going to jail, but what he could not do was get the money back from Ravelo.

In fact, Trial Judge Bell well-recognized the uncertainty of the situation when he said at the May 17, 2007 where he adjudged Sims in contempt and engaged Sims and his attorneys in a discussion about raising $1.5 million while ignoring the fact that Ravelo would not give back the money Sims had sent him:

> THE COURT: Yeah, I don't want to -- I don't necessarily want to force somebody to liquidate some real estate **when the final result is really up in the air,** but as long as it's a lien, and if **they [the Kelly beneficiaries] prevail, they can get it,** subject to the mortgage, of

> course, but there's nothing you can do about that anyway. I mean, it's mortgaged. [emphasis added]

After Sims spend some two months in the county jail, Trial Judge Bell finally relented and allowed Sims to put up everything he owned to purge the contempt which was far less than the $1.5 million Sims had sent to Ravelo in southern Florida. *See*, Petitioner's Appendix E, Order Providing Purge and Release.

Respondents make much of Sims' scheme to take his affairs into Federal bankruptcy court, which is a lawful haven for persons hounded by creditors and lawsuits to seek relief. Had Sims stuck with his bankruptcy, this case might have had a much different outcome. Unfortunately, Ravelo was a crook [as is evidenced by the supplementary proceedings in the Okaloosa County Circuit Court where Sims has willingly testified in support of the beneficiaries efforts to prosecute Sims' third party petition against Ravelo]. As the trial attorneys for Respondents argued in their June 15, 2010 brief supporting Sims' third-party complaint against Ravelo:

> A large part of the problem [not obtaining a credible accounting from Ravelo on the funds Sims transferred to Ravelo and/or his companies] was created by Ravelo commingling his own monies with those received from Sims and Sims entities, and spending from the Atlantis Mariner [a Ravelo company] account on behalf of himself, his (Ravelo's) entities, and for Sims [citation to transcript is omitted]. Sims repeatedly testified the monies were to be

> placed in a separate account [citation to transcript is omitted], but this was never done.

As to Sims withdrawing his bankruptcy filing, as Respondents agree, the bankruptcy judge made no findings in the case other than allowing Sims to withdraw the petition. That Respondents cite themselves in support of their argument that Sims attempt at bankruptcy was unlawful belies what the federal bankruptcy law allows.

Trial Judge Bell denied Sims due process and subjected Sims to a cruel and unusual punishment when Judge Bell sent Sims to jail knowing that was unable, despite his best efforts, to raise $1.5 million. That Judge Bell settled two and a half months later for the same Sims property he could have gotten on May 30, 2007 is material evidence of Judge Bell's unlawful Order of Contempt.

III. Review by this Court is necessary to remind State courts – and Florida in particular – that state courts are not free to ignore their own laws and state appellate courts are not to be apologists for trial courts, but, in fact, are to act as a check and balance.

On June 11, 2008, Sims asked Trial Judge Linda Nobles to consider a pretrial order that would have allowed a full jury trial on the record, with the Court reserving its equitable and procedural rulings for post-trial consideration. Florida law dictates that where issues involved in an action are both legal and equitable in nature, the legal issues require resolution

by a jury. *Yer Girl Tera Mia v. Wimberly*, 962 So.2d 993, 996 (Fla. 5th DCA 2007).

Here, like most jurisdictions, Florida trust law is a mixture of law and equity. Here, Respondents filed two separate complaints against Sims and then consolidated those complaints. One complaint asked for equitable relief and the other complaint asked for legal relief and a trial by jury. Should this Court grant certiorari, Sims contends that the record will show a consistent pattern on the part of circuit court judges Bell and Nobles to find the quickest way to end the case regardless of the legal or equitable relief sought and regardless of the legal and equitable defenses that Sims would have proven at trial.

Petitioner agrees with Respondents' citation to *R.J. Reynolds Tobacco Co. v. Kenyon*, 882 So.2d 986, 989 (Fla. 2004) that writing an opinion is committed to the sound discretion of the district court of appeal. Here, Sims contends that "sound discretion" does not equate to "absolute discretion."

Most recently, this Court reversed the conspiracy convictions for Jeffrey Skilling of Enron fame. *Skilling v. United States*, 08-1394, 2010 WL 2518587 (U.S. 2010). Justice Scalia's concurring opinion (joined by Justices Thomas and Kennedy) confirmed that vague statutes that fail to provide a person of ordinary intelligence with fair notice of what is prohibited violate due process of law. Here, Florida trust law allows exceptions and makes special provision for those trustees who act in good faith, under advice of counsel, etc. Yet, whether it was putting Sims in jail or whether it was confiscating all of his property or whether it was denying Sims the opportunity to prove

good faith, advice of counsel, settlor's intent, etc., the Florida trial and appellate courts simply ignored the law.

The troubling aspects of Florida's constitution that essentially makes this Court the court of last resort for Florida citizens (when a district court of appeal deigns to write an opinion) may, in some instances, not withstand federal scrutiny. Here, Sims contends that his case is an excellent vehicle for this Court to review the duties of appellate courts to write opinions in cases that are demonstrably complex.

Indeed, without the check and balance of the United States Constitution to guide state courts, this country's citizens would not be free to enjoy the liberties we do. As we have seen over and over again in this country and all others, unfettered discretion leads to oppression. Those in power find it easy to forget they are there only by consent of those they govern.

The smattering of the record before this Court shows that Paul Sims, even in old age, is not a man standing in awe of the mighty power of the Florida courts. This grit served this country and Sims well in World War II when Sims flew with the Burma Bridge Busters. Here, Sims will not argue that he is without blemish, but he will argue that whatever he is or whatever he did in the course of the never-ending litigation with his one-time step-children, he had a right to his day in court and to be judged on the merits of what he did to fulfill the wishes of Mattie Kelly.

Petitioner's counsel is reminded of the exchange between Sir Thomas More and More's son-in-law,

William Roper, in the movie A MAN FOR ALL SEASONS. More and Roper are discussing More's predicament and Roper's impassioned belief that the King's actions were the work of the Devil. More cites to the law and cautions Roper about his zeal:

> **Roper**: So, now you give the Devil the benefit of law!
>
> **Sir Thomas More**: Yes! What would you do? Cut a great road through the law to get after the Devil?
>
> **Roper**: Yes, I'd cut down every law in England to do that!
>
> **More**: Oh? And when the last law was down, and the Devil turned 'round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast, Man's laws, not God's! And if you cut them down, and you're just the man to do it, do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake!

Paul Sims seeks the benefit of the law and maintains that the United States Constitution protects even disagreeable old men.

Here, the Trust lost no money as the result of Sims' investments; yet, the Florida courts put Sims in jail and forced him to forfeit everything he owned. The trial court struck his pleadings as to damages, decided later that it had struck his pleadings as to all issues,

and not until August 2008 decided what the law of the case was and that the law of the case meant that Sims was personally liable for six million dollars in income that he denies making. Then, the trial court told Sims he could not present evidence as to any issue and that he actually had been adjudged personally liable in May 2004.

Then, Florida's First District Court of Appeal approved every conflicted trial court action but decided not to let Petitioner Sims in on the reasons why.

CONCLUSION

For the foregoing reasons and those stated in the Petition, Petitioner respectfully submits that his Petition for a Writ of Certiorari should be granted.

Dated: June 30, 2010

Respectfully submitted,

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